UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHN WEBB,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:01 CV 1244 ERW
	)	DDN
DON ROPER,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon the petition of Missouri state prisoner John Webb for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b). For the reasons set forth below, the undersigned recommends denying habeas relief.

On June 23, 1997, Webb was convicted by a jury in the Circuit Court of St. Louis County, Missouri, on one count of murder of Calvin McGee in the first degree and one count of armed criminal action. The court sentenced Webb to concurrent terms of imprisonment for life without possibility of parole and life imprisonment, respectively. Webb's conviction was affirmed on appeal and transfer to the Missouri Supreme Court was denied.

On May 4, 1999, Webb filed a post-conviction relief motion pursuant to Missouri Supreme Court Rule 29.15. The circuit court denied the motion after an evidentiary hearing. (Resp. Ex. M at 91.) Webb appealed the denial of post-conviction relief and the Missouri Court of Appeals affirmed the denial on June 12, 2001. (Resp. Ex. Q.)

On August 6, 2001, this court received a petition for a writ of habeas corpus from Webb; the petition was filed on August 9,

2001. (Doc. 4.) Webb seeks federal habeas corpus relief on 12 grounds:

(1) the trial court erred in admitting Dionne Randle's testimony regarding statements made by petitioner Webb and Tim Spears concerning the shooting of Calvin McGee;

(2) the trial court erred in permitting the prosecutor to cross-examine petitioner in a way that insinuated the existence of extra-judicial statements by others;

(3) the trial court erred in permitting the scope of the prosecutor's cross-examination of petitioner concerning his prior arrest, prosecution, and conviction;

(4) the trial court erred in failing sua sponte to respond to the prosecutor's closing argument that implied personal knowledge that petitioner had shot Calvin McGee;

(5) the trial court erred in failing sua sponte to respond to the prosecutor's closing arguments that implied to the jury that petitioner would harm the jury;

(6) the trial court erred in overruling petitioner's objection to the prosecutor's attempt to define the required element of "deliberation" and the nature of accomplice liability;

(7) the trial court erred in failing sua sponte to respond to the prosecutor's "ongoing prosecutorial misconduct" based on the prosecutor having engaged throughout the trial in a purposeful pattern of improper questioning of witnesses and improper commentary and argument;

(8) the trial court abused its discretion and committed plain error in failing to instruct the jury on the lesser included offense of murder in the second degree;

(9) insufficient evidence to support the conviction of murder in the first degree;

(10) ineffective assistance of trial counsel for counsel's failure to timely investigate and endorse alibi witness Cartellia Webb;

(11) ineffective assistance of trial counsel for counsel's failure to make a testimonial offer of proof regarding Cartellia Webb's testimony; and

(12) ineffective assistance of trial counsel for failing to object to the prosecutor's improper assertion of personal knowledge and the prospect of petitioner's future criminality. (Doc. 16.)

BACKGROUND

In its opinion, the Missouri Court of Appeals recounted the facts which support the verdict and which are relevant to Webb's allegations of constitutional violation:

> Calvin McGee (victim) was shot to death in his home on Thursday, October 5, 1995. The victim's brother, Alfredo McGee (Alfredo), and defendant attended Jennings high school together. From the fall of 1994 to the fall of 1995, Alfredo had several physical confrontations with defendant, and two of defendant's friends, Tim Spears (Spears) and Zachary Jones (Jones). These confrontations eventually escalated from fist fights to an exchange of gunfire on Sunday October 1, 1995, at O'Fallon Park. The incident at O'Fallon Park involved Alfredo and his friends, and two individuals driving defendant's gray Jimmy (truck), one of whom was positively identified as Spears. Alfredo was subsequently arrested and pled guilty to unlawful use of a weapon. Alfredo was released from custody on Thursday, October 5, 1995. At trial, Alfredo could not positively identify defendant as driving the truck.
>
> On Thursday, October 5, 1995, at approximately 10:30 P.M., Willie Boyd (Boyd) was at his home located at 5667 Leverette, in the City of Country Club Hills, Missouri, with his two step-sons, Alfredo and victim. Hearing the doorbell ring, Boyd asked who was outside the door, at which point someone replied "Ed. Is Alfredo home?" Boyd partially opened the door and found two young men dressed in dark clothing, standing on the porch leading up to Boyd's home. After one of the men again asked for Alfredo, Boyd partially closed the door, and went to tell Alfredo he had a visitor named "Ed." Mistakenly believing "Ed" was there to see him, victim went to the door and was shot eleven times in the head and chest area resulting in his death. Boyd then called 911 to report the incident to the police.

Upon arriving at the crime scene, police recovered thirteen spent nine millimeter caliber shells, and three spent .380 automatic caliber shells. John Kaltenbronn, a ballistics expert employed by the St. Louis County Police Department, later determined all thirteen nine millimeter caliber shells had been discharged by one firearm, and the three .380 automatic caliber shells had been discharged from one firearm. Subsequently, the Major Case Squad was activated and aided the St. Louis County Police Department in apprehending defendant.

In the early morning hours of Friday, October 6, 1995, Detective Craig Layton, of the Major Case Squad, received a lead from Tapatrick Barbee (Barbee), an acquaintance of defendant and cousin of Spears, to investigate Jones in connection with the murder of the victim. Upon arriving at Jones' home located at 4444 West Pine, Detective Layton observed, and eventually seized, ten bullet-proof vests from the closet of Jones. At trial, Detective Layton identified a green bullet-proof vest, riddled with bullet holes, as one of the vests seized from Jones' closet. Upon examining the bullet-proof vest seized from Jones' closet, Detective Kaltenbronn determined that a bullet retrieved from the victim's jaw, and two taken from the scene of the crime, positively matched a bullet taken from the green bullet-proof vest.

Barbee told police that at around 8:00 P.M. on the evening of the murder, Jones, Spears, and defendant discussed a plan to go to a home in Country Club Hills, and kill someone they had fought with at school, and had exchanged gunfire with at O'Fallon Park. Upon arriving at the home, defendant, Spears and Jones were going to shoot the individual. Defendant told Barbee he intended to go up to the front door and was going to ask for the individual, and when the individual came to the door, defendant, Jones and Spears were going to begin firing their weapons. Barbee informed the police that defendant had shown him and professed to own a nine millimeter gun, with a black handle, and a green bullet-proof vest. Defendant, who was dressed in dark clothing, tried on the green bullet-proof vest in front of Barbee. He also told Barbee he intended to shoot the victim with the nine millimeter gun. In deciding how they were going to drive over to the victim's home, defendant told Barbee that defendant would drive his Truck, and Spears would use his uncle's blue Honda. Additionally, defendant recommended

that they wear pantyhose over their faces, to conceal their identities. Consequently, Jones, Spears and defendant tried the pantyhose on in front of Barbee wondering if Barbee could see their faces.

Dionne Randle (Randle) told police that she was Spears' girlfriend from 1992 to 1995, and had attended Jennings High School with Spears, defendant and Alfredo. She said that defendant lived at a house located on Partridge Avenue. On October 5, 1995, after the shooting of victim, Randle said she was at defendant's home with defendant's girlfriend, Tasha McIntire, Spears, and defendant. Sitting on a bed in defendant's home, defendant and Spears were talking about the murder of victim. Defendant and Spears told Randle that defendant had gone up to the door of victim's house, with Spears and Jones standing on the side of the house. They told Randle that defendant knocked on the door and asked for Alfredo, and when the victim came to the door, they had mistakenly shot the victim. Additionally, defendant and Spears told Randle that as they shot the victim, Spears' gun would not fire since he had left on the safety. Finally, they told Randle that after the shooting, they ran to their automobile and drove away.

Randle also testified that on the morning of Saturday, October 7, she received a phone call from defendant and Spears. During the course of the phone call, defendant told Randle he was leaving town to avoid being caught for the murder of the victim.

Subsequently, police arrested Jones on October 7, 1995. Unable to locate Spears or defendant, police set up surveillance at defendant's home on Partridge Avenue, and arrested defendant on October 10, 1995. Defendant, along with co-defendant Spears, was charged by indictment with murder in the first degree and armed criminal action in connection with the murder of Calvin McGee. At the time of trial, Spears was deceased.

Prior to trial, defense counsel filed a motion in limine to exclude any prior acts, convictions, and/or oral statements in relation to defendant or any co-defendant, including statements by Randle, on the grounds that such evidence constituted hearsay and would be prejudicial to defendant. Additionally, defense counsel asked that there be no mention of Spears' death in the presence of the jury. The trial court sustained the

motion in regards to mentioning Spears' death in the presence of the jury. Also, the trial court sustained the motion in regards to possible statements made by Barbee and/or Randle, regarding defendant's prior participation in any activities related to: weapons charges; false declarations charges; gang related activities; and/or selling drugs. However, the trial court denied the motion in part, and allowed Randle and Barbee to testify in regards to the O'Fallon Park incident. In addition, Randle was permitted to testify regarding statements made by defendant and Spears in defendant's presence.

Defendant also filed a motion in limine to suppress any statements made by Randle, which was denied.

At trial, defendant testified, and was asked if he had been convicted of or pled guilty to any crime. Defendant testified that sometime in 1993, he had found a gun on the street, and accidentally shot his cousin in the leg. To avoid punishment, initially defendant had reported to the police that his cousin's injury had been the result of a drive-by shooting. Later that same day however, at the police station, defendant told the police he had accidentally shot his cousin. Subsequently, defendant pled guilty to making a false police report on November 24, 1993. Defendant received a $500 fine and two years on probation.

In regards to the murder of the victim, on direct examination, defendant denied any complicity in the crime. Defendant stated that on the night of the crime, he had been at Shirley Harvey's (aunt) house, and had not seen Spears on the day of the shooting, or at anytime during the next five days. Defendant's alibi was corroborated by Harvey.

On cross-examination, the state proceeded to ask defendant certain questions regarding his prior conviction. Defense counsel objected, stating it would be reversible error to allow the state to divulge any deeper elements of defendant's prior conviction. The trial court overruled the objection, stating that defense counsel had "opened the door" as to defendant's prior conviction. As a result, the state had the right to ask certain questions in accordance with what had been asked on direct examination, to clarify the sentence defendant had received.

> Eventually, the state presented the testimony of Randle. Defense counsel objected to the state's line of questioning as hearsay since Randle could not attribute any one statement to either Spears or defendant. The trial court overruled defense counsel's objection, and allowed Randle to testify.
>
> Additionally, the state presented the testimony of David Robert (Robert), Susan Waltke (Waltke), and Lisa Hoff (Hoff). Robert, general manager of the Holiday Inn Airport (hotel), testified that on Friday, October 6, an American Express Card (credit card) belonging to Tommy Webb, defendant's father, was used to check out of two rooms. Moreover, Waltke, an employee of Budget Rent A Car (Budget), testified that the same credit card was used to rent a brown Ford Taurus, on October 8, 1995. Finally, Hoff, an employee of the Hampton Inn at the St. Louis Airport, testified that on October 8, 1995, a "T. Webb" checked into the hotel. Upon checking out the next day, the credit card was used as payment for the room. Neither Robert, Walkte, nor Hoff, could identify defendant as having checked out of the hotel rooms, or renting the Ford Taurus.
>
> At the close of all evidence, the trial court denied defendant's motion for judgment of acquittal. The jury found defendant guilty on both counts. Defendant's motion for judgment notwithstanding the verdict or in the alternative motion for a new trial was denied.

(Resp. Ex. G at 3-8.)

EXHAUSTION AND STANDARD OF REVIEW

In his Supplemental Response, filed February 26, 2003 (Doc. 16), respondent concedes that Webb's claims are exhausted. (Doc. 16 at 3.) Respondent does not argue that any of the 12 alleged federal habeas corpus grounds are procedurally barred. Therefore the undersigned has reviewed the merits of each.

Federal habeas relief may not be granted on any claim that was adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "A State court's decision is contrary to clearly established law 'if the controlling case law requires a different outcome either because of factual similarity to the State case or because general federal rules require a particular result in a particular case.'" Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999) (quoting Richardson v. Bowersox, 188 F.3d 973, 977-78 (8th Cir. 1999), cert. denied, 529 U.S. 1113 (2000)), cert. denied, 531 U.S. 886 (2000).

The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the State court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion). The Supreme Court has distinguished an unreasonable application of federal law from an incorrect application of federal law. Id. at 365. "A federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. Further, a state court's determination of a factual issue is presumed to be correct and must be rebutted by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1).

DISCUSSION

GROUND 1

Webb's first claim is that the trial court erred in admitting Dionne Randle's testimony regarding statements made by Webb and Tim Spears concerning the shooting of Calvin McGee. Webb claims that this testimony was inadmissible hearsay because Randle was not able to attribute the extrajudicial statements to either Webb or Spears. Evidentiary rulings are state-law questions and the Supreme Court has ruled that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 68 (1991).

The issue before this court is whether the admission of this evidence violated Webb's federal constitutional rights. "A state court's evidentiary rulings can form the basis for federal habeas relief under the due process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process." Bounds v. Delo, 151 F.3d 1116, 1119 (8th Cir. 1998) (quoting Parker v. Bowersox, 94 F.3d 458, 460 (8th Cir. 1996), cert. denied, 520 U.S. 1171 (1997)). The Missouri Court of Appeals denied this claim as follows:

> Hearsay evidence is in-court testimony of an out-of-court statement offered to prove the truth of the matter asserted within the out-of-court statement. State v. Masslon, 746 S.W.2d 618, 625 (Mo. App. 1998). Although Randle's testimony is hearsay, it appears that statements made by defendant and Spears constitute an exception to the hearsay rule.
>
> * * *
>
> The record indicates that the statements made by defendant and Spears, describing in detail the shooting of the victim, are incriminating, and connect defendant and Spears to the crime. Further, Randle received a phone call from defendant and Spears the morning following the shooting, whereupon defendant told Randle

> he was leaving town to avoid being caught for the murder of victim, which indicates a consciousness of guilt. Accordingly, the statements were against defendant's and Spears' interest and are admissions.
>
> Defendant argues that the statements are inadmissible because Randle cannot attribute particular statements to either defendant or Spears. However, assuming *arguendo* that the statements were made by Spears, it is undisputed that defendant was present when the incriminating statements were made. Thus, they would be admissible against defendant under the tacit admission exception to the hearsay rule because, the statements were made in his presence and hearing, were sufficiently direct to call for a reply, and were made in the bedroom of his home. State v. Samuel, 521 S.W.2d 374, 375 (Mo. banc 1975). By his silence and subsequent conduct, defendant tacitly admitted his part in the murder. Id. Accordingly, the statements were admissible.
>
> However, if the statements were made by defendant, they would clearly be admissible. Regardless, Randle's inability to identify the speaker of the statement, under the circumstances, does not render the statements inadmissible or prejudicial.

(Resp. Ex. G at 8-9.)

The admission of Dionne Randle's testimony did not deprive Webb of due process. The Missouri Court of Appeals correctly concluded that her testimony fell under the tacit admission exception to the hearsay rule. Under Missouri law, the following conditions must be met in order to satisfy the "tacit admission rule:" "(1) the statement must be made in the presence and hearing of the accused;" "(2) the statement must be sufficiently direct, as naturally would call for a reply;" and "(3) the statement must not have been made at a judicial proceeding, or while the accused was in custody or under arrest." State v. Samuel, 521 S.W.2d 374, 375 (Mo. 1975) (en banc). The record reflects that Webb's presence is undisputed when the statement was made. Webb denies that he was privy to Spears and Randle's conversation, but there is no evidence in the record to the contrary. (Resp. Ex. B at 686-93.) The

statement was direct and should have elicited a response, but Webb remained silent, and the statement was extrajudicial. Because under Missouri law, Webb tacitly admitted to the crime, Randle's inability to attribute any of the extra-judicial statements to Webb or to Spears is immaterial and did not prejudice the defense.

Further, under federal law, an admission may be made by adopting or acquiescing in the statement of another. See Fed. R. Evid. 801(d)(2)(B). The United States Supreme Court has abolished the tacit admission rule when the defendant is in a custodial situation and remains silent. See Miranda v. Arizona, 384 U.S. 436, 468 (1966). However, because the extra-judicial statements were not made in a custodial situation, the Missouri Court of Appeals' ruling is not contrary to nor an unreasonable application of federal law.

Ground 1 is without merit.

GROUND 2

Webb's second claim is that the trial court erred in permitting the prosecutor to cross-examine him in a way that indicated the existence of extra-judicial statements. Webb contends that the prosecutor's cross-examination constituted hearsay testimony. The following exchange is challenged:

> Q. [PROSECUTOR:] Well, tell me about this group of people. You, Keith Stewart -- Keith Stewart is your cousin, right?
>
> A. Yes.
>
> [DEFENSE COUNSEL:] Your Honor, I object as this being beyond the scope of direct examination.
>
> THE COURT: I'll overrule the objection.
>
> * * *
>
> Q. Henry Wright?

A. Yes.

Q. All right. And he's your cousin too?

A. Yes.

Q. And Henry Wright was pretty close to you at that time, was he?

A. Yes.

Q. And so was Keith Stewart, wasn't he?

A. Yes.

Q. All right. And so Henry Wright would have known what you were doing during this time period, wouldn't he?

A. No.

[DEFENSE COUNSEL:] I object as to what Henry Wright would have known. She's asking my client to speculate.

THE COURT: Okay, give me the legal objection.

[DEFENSE COUNSEL]: Legal objection is speculation.

THE COURT: Then I'll sustain that objection, but please give me no more speaking objections, just legal objections.

Q. . . . Henry Wright, had he seen you on Friday, October 6 in the morning? He would remember that, wouldn't he?

A. Could you repeat the question again please?

[DEFENSE COUNSEL:] Your Honor, I object. Again, she's still asking for speculation.

THE COURT: I am going to sustain that objection.

Q. . . . Isn't it true that you and Henry Wright saw each other Friday morning, October 6 at your father's business, at Laces & Armor?

A. No. I haven't seen Henry Wright.

Q. Isn't it true that Henry Wright and Keith Stewart went to [your] cousin -- went to your shop on Friday, October the 6th?

A. No.

[DEFENSE COUNSEL:] Your honor --

Q. . . . Isn't it true that when they got there --

[DEFENSE COUNSEL:] Your Honor, I'm going to object to this line of questioning because the prosecutor is attempting --

THE COURT: Wait a minute. Give me the legal objection.

[DEFENSE COUNSEL:] The prosecutor is attempting through her questions to get into information -- First of all, it's outside of the --

THE COURT: Give me your legal objection.

[DEFENSE COUNSEL:] My legal objection is that, first of all, it's difficult for me to give the objection when I don't see what -- she doesn't show me what she's referring to.

THE COURT: She doesn't have to at this point.

[DEFENSE COUNSEL:] Second of all, she's trying to read into evidence matters that have not been testified at any point in this entire case. She's trying to read someone else's testimony so, therefore, it's hearsay that -- she's attempting to testify to in the form of questions. My legal objection, if you must hear it, first of all, is that it's hearsay and that she's asking my client to speculate on what somebody else said or did.

THE COURT: And your question -- just repeat your question. Don't answer the question.

[PROSECUTOR:] My question was, isn't it true that Henry Wright and Keith Stewart met you Friday morning at Laces & Armor?

A. No

THE COURT: Then I'm going to overrule that objection.

[DEFENSE COUNSEL:] May we approach the side bar?

THE COURT: No. We're going to go ahead.

[DEFENSE COUNSEL:] My objection is that this is hearsay.

THE COURT: I overruled it based on the question that she asked.

Q. . . . Isn't it true that Henry Wright, your cousin, and Keith Stewart, met you Friday morning at Laces and Armor?

A. No.

Q. Isn't it true that it's at that time that you had them take Tim Spears --

[DEFENSE COUNSEL:] Your honor, to allow the prosecution to ask this question -- if she wants to give an offer of proof as to -- right now she's testifying. Those two people have not testified in anybody's case.

THE COURT: Get up here, both of you.

[DEFENSE COUNSEL:] It's highly prejudicial to ask these questions.

THE COURT: Stop it.

(Counsel approached the bench, and the following proceedings were had out of the hearing of the jury:)

* * *

THE COURT: Now, would you be quiet for a second. Now stop it. Now what are you asking? Are you asking -- What are you asking, statements –

[PROSECUTOR:] I'm asking him about his whereabouts and what he did Friday morning. We endorsed Henry Wright. My investigator has talked to Henry Wright. We've sent him a subpoena, all right.

THE COURT: But you need to keep your questions to what he knows.

[PROSECUTOR:] That's what I'm trying to do.

THE COURT: Okay. Then I will overrule the objection.

(The proceedings returned to open court.)

Q. . . . Isn't it true that on Friday morning, Henry Wright and Keith Stewart met you at Laces & Armor at which time you gave them Johnny Barbee's blue Honda?

A. No.

Q. Isn't it true then at some point, you asked them to take that blue Honda back to Johnny Barbee because Tim Spears was so sick.

A. I haven't -- I haven't seen Henry Wright that day.

Q. All right. Well, then what day was it that you asked them to take the blue Honda back to Johnny Barbee?

A. I didn't ask him to take no car back.

Q. So you never talked to them at all on Friday regarding the blue Honda or anything else?

A. No.

(Resp. Ex. B at 1233-39.)

The Missouri Court of Appeals denied this claim stating:

> The prosecutor's cross examination of defendant refers to a knowledge of facts not in evidence. The reference to Wright and Stewart was an apparent attempt by the state to have the jury believe that defendant had seen Wright and Stewart the morning after the crime, and were asked to take the Honda back to Barbee's uncle. Though Barbee's testimony had corroborated that defendant had borrowed the Honda on the night of the shooting, neither Wright nor Stewart testified.
>
> Pursuant to MAI-CR3d 302.02, the jury was instructed that it must not assume as true any fact solely because it is included or suggested by a question asked a witness, and there is no indication in the record that the cross examination of defendant, in regards to Wright and Stewart, was thereafter referred to by the state. Defendant's denials of the questions asked by the prosecutor, in addition to the instructions given,

preclude us from finding any prejudice to defendant. State v. Butler, 549 S.W.2d 578, 580-581 (Mo. App. 1971).

(Resp. Ex. G at 15.)

Under federal law, the Kotteakos[1] harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error during trial. Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). "The test under Kotteakos is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. at 637 (quoting Kotteakos, 328 U.S. at 776). The Supreme Court has stated "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22 (1967).

In Webb's case, the Missouri Court of Appeals correctly concluded that the prosecutor's cross-examination of defendant was improper, but that the error did not have a substantial effect on the jury's verdict. Although Johnny Barbee's testimony corroborated that Webb borrowed his car on the evening of the crime, Webb denied ever speaking with or asking Wright or Stewart to return the car to Barbee the morning after the crime. The prosecutor never referred to this line of questioning again during the trial, and the jury was instructed not to believe as fact anything suggested by questions of witnesses. Because the prosecutor's error did not have a substantial and injurious effect on the jury's verdict, the Missouri Court of Appeals' decision is not contrary to nor an unreasonable application of federal law.

Ground 2 is without merit.

---

[1]Kotteakos v. United States, 328 U.S. 750, 757 (1946).

GROUND 3

Webb's third claim is that the trial court erred in permitting the prosecutor to cross-examine petitioner concerning his prior arrest, prosecution, and conviction. Webb contends that the prejudicial potential of evidence obtained during this cross-examination outweighed its probative value. Webb testified on direct examination as follows:

> Q. [DEFENSE COUNSEL:] Now, John, have you ever been convicted or pled guilty to a crime before?
>
> A. Yes.
>
> Q. And do you recall when that was?
>
> A. In '93 or '92 or '93.
>
> Q. And do you recall what the nature of that charge was?
>
> A. It was a false declaration.
>
> Q. A false report; is that correct?
>
> A. Yes.
>
> Q. Okay. In other words, you told the police something, told the police something that was incorrect; is that correct?
>
> A. Yes.
>
> Q. And will you tell us briefly what that involved.
>
> A. Me asking [sic] Denny shoot my cousin in the leg, playing -- not playing with a gun, looking at it and it went off.
>
> Q. Where did you get that gun?
>
> A. It was in the driveway.
>
> Q. You found it in the driveway?
>
> A. Yes.

Q. And in the process of showing it to her, the gun went off?

A. It went off.

Q. What did you tell the police?

A. I told the police a drive-by came by because I was afraid what my mother would do. I took the car because it had dealer plates on it.

Q. You had a lien against; is that correct?

A. Yes.

Q. And did the police ask you again that same day whether or not that was the truth?

A. Yes, and I told them the truth.

Q. And what was the truth?

A. The truth was I was playing with a gun and I found it in the driveway. I told them the truth what happened.

Q. And did your cousin also tell them that the same story that you told them originally?

A. Later on that day, she told the truth.

Q. Okay. So you both were working on telling -- you both told the police the same lie; is that correct?

A. Yes.

Q. And you were charged with making a false report; is that correct?

A. Yes.

Q. Because you didn't report it as an accident?

A. But when I got [to] the station, I still was kind of scared, and I told them I found the gun somewhere else but I didn't buy the gun. I found it.

Q. You found that gun?

A. Yes.

Q. Okay. And then you pled guilty to that charge?

A. Yes.

Q. And you received what, probation; is that correct?

A. Two years probation.

Q. Suspended imposition of sentence?

A. Yes.

(Resp. Ex. B at 1212-15.) The challenged cross-examination is as follows:

> Q. [PROSECUTOR:] Since you explained to the jury some of the background of this prior making a false police report you have, I'm going to ask you a few questions about that, okay?
>
> A. Yes.
>
> [DEFENSE COUNSEL:] Your Honor, may we approach the bench before she begins to inquire?
>
> THE COURT: Okay.
>
> (Counsel approached the bench, and the following proceedings were had out of the hearing of the jury:)
>
> [DEFENSE COUNSEL:] Your Honor, prior to motions in limine, I mentioned to you the case of State vs. Aye. This is a -- cite of the case is 927 S.W.2d 951. It's a 1996 case which basically says that if the defense brings out the nature under when, what type of and state the nature of the offense that the prosecutor would not be allowed to go into detail on cross-examination. All of the elements of that, it would be reversible error for the prosecutor to be allowed to go into the -- not to divulge a deeper element of that particular crime. All that she is allowed to do is to -- she can introduce the actual court document regarding that charge, but she would not be allowed to go into great detail regarding the contents or the specifics of that particular crime.
>
> THE COURT: What's your response?

[PROSECUTOR:] My response is that had she simply asked him what, when, why, how, you know, the basics, maybe I'd be limited then, but she has opened the door by asking him and allowing him to explain away this prior, and I should be allowed to now get into that. Had he just simply answered I pled guilty to a false report on x date and I got this prior --

THE COURT: Then what?

[PROSECUTOR:] I pled guilty to a false report on 11-24-93 and got a $500 fine -- See, that's not even accurate -- then maybe I wouldn't be able to get into it unless he's making --

THE COURT: I can't hear you, Mrs. McIntyre. What do you want to get into?

[PROSECUTOR:] I want to get into what's in the police report because she opened up the door. He's explaining away what happened, and I want to be able to cross-examine him on what really happened. He's giving self-serving statements regarding that prior. I can also cross-examine him.

He indicated that he got a suspended imposition of sentence. He actually received a conviction and got six months in DJS and $500 fine, unless I'm reading this incorrectly. Yeah. Let me see this though.

[THE COURT:] Ms. Moore-Dyson, didn't you specifically ask him for details? You went into more than just the nature of the crime and the date and the sentencing. You asked him about details of it. You asked him about the gun. You asked him about what exactly happened. You asked him what -- I think it was his cousin to the police. You asked him -- you know, you went into more details than just the nature, just saying, were you, in fact, convicted of this charge and what type sentence. . . .

[DEFENSE COUNSEL:] Your Honor, I got it myself by the case of State vs. Aye in determining exactly what I needed to bring out in order to disallow the prosecution from being able to go into the specific detail. He may have provided me with more than I asked for, but I believe that but still that the prosecution is limited to -- I mean, she can produce the actual plea and what --

and what the punishment was. He basically told me what he remembered of that particular case. He could not remember the exact date that he pled guilty or whether or not it was a suspended imposition.

THE COURT: No, I'm not questioning that. What I'm saying is, you specifically asked him questions about the actual details of the crime that he was charged with. You did not just leave it as, didn't you plead guilty to this and you got this sentence. You specifically asked him details about the crime, where he -- talked about finding the gun and you asked him about finding the gun. You asked him also what his cousin said to the police. I mean, you went into details as to what he says his version of the prior was, and because of that, I think you have opened up the door to allow the State to go into some details to rebut what he just said.

If you had left it at just specifically, did you plead guilty and what was your sentence, then I would agree with your objection, but I think you opened up the door because you specifically asked him details about the events on that plea, so I think you've opened up the door.

* * *

Q. [PROSECUTOR:] Now, you indicated earlier that you pled guilty to the crime of making a false police report; is that correct?

A. Yes.

Q. All right. And there's actually a court file that indicates that you actually pled guilty to this; isn't this true?

A. Yes.

Q. All right. And so it's documented that you have this prior for telling the police a false police report; isn't that true?

A. No, but I was afraid that of what happened at the time.

Q. Well, what I'm asking you is, there's no way you can deny this. There is an actual document in this

courthouse that shows that you pled guilty to a false police report; isn't that correct?

A. Yes.

Q. So you have to deny it because there's an actual or you have to admit it because there's an actual document here in the courthouse; isn't that correct?

A. Yes.

Q. All right. And you indicated that what you did was you made a false report to the police.

A. Yes.

Q. All right. And the charge that you pled guilty to and what you did is that you made a false report to the police officer that a drive-by shooting took place and that's how Kim Purnell was shot; isn't that true?

A. Yes.

Q. So the false statement you made to the police was there was a drive-by shooting?

A. But I told the truth.

Q. After you had no way around it; isn't that true?

A. Yes, but I still told the truth.

Q. Because the police looked at her injuries along with the paramedics and saw that it was a contact wound and said it couldn't have been a drive-by shooting.

[DEFENSE COUNSEL:] Your Honor, I object as to that question. I believe that the prosecutor is going a lot further than -- beyond cross-examination dealing with the type of wound or if it was a wound or whatever.

THE COURT: I'm going to sustain that objection.

Q. [PROSECUTOR:] So you are saying you told the truth just because it was in your heart and you decided I had to tell the police the truth?

A. Yes.

Q. But prior to that what that -- when the police came, you were willing to claim that you were standing on the front porch and you heard a vehicle traveling at a high rate of speed coming down Wedgewood toward Cole --

[DEFENSE COUNSEL:] I object as to the prosecutor reading those details pursuant to the case that I provided to you and also that it goes beyond the bounds of direct examination.

THE COURT: I'm going to sustain the objection.

Q. [PROSECUTOR:] You indicated that you told the police that the drive-by shooting --

[DEFENSE COUNSEL:] Your Honor, I'm going to object to the continuing --

THE COURT: Wait a minute. Come up to side bar. . . . Now, Mrs. McIntyre, how far do you plan on going into this because I don't think -- I've allowed you because of the fact that I felt that she opened up the door. We're not here to try the other case and you are also -- you also have to be careful. I don't think you can -- I don't know why, what the purpose is, what the purpose of going into all of this is.

[PROSECUTOR:] He is trying to make it out like he was just a good-natured guy. That's why he told the police this and not because he was caught.

[DEFENSE COUNSEL:] That is not true.

THE COURT: Wait a minute.

[PROSECUTOR:] He offered self-serving statements as to why he would tell the police and confess, and I should be able to get into that. You know, the police said that they felt that what he said wasn't the truth and they confronted him. He didn't come to them. They confronted him.

THE COURT: But I don't think you should be -- I'm going to sustain the objection as to getting into all the details of this. I think I've allowed you -- evidence of other crimes are not always allowed in. Now, this is where I think that I'm allowing you to get into a little bit more because I think the defense attorney opened up

> the door, but I'm not sure that you should be allowed to go into great details, everything that he said. I think you have to keep it relevant to this case as to why you are going into it, so what are you planning on -- the next --
>
> [PROSECUTOR:] The next thing I'm going to get into is his sentence that he received.
>
> THE COURT: Okay.

(Id. at 1217-27.)

The Missouri Court of Appeals denied the claim holding:

> Defendant brought up the matter of why he was convicted of filing a false police report during his case-in-chief. Defendant, as part of his reason, claimed to have made the false police report "because I was afraid what my mother would do." This opened the door for the state's cross-examination as to why defendant made false statements to the police. If on direct examination, the defendant refers in a general way to a subject, he may then be cross-examined in detail on that subject. State v. Murphy, 592 S.W.2d 727, 731 (Mo. banc 1979). Here, defendant explained his purpose in filing the false report. Thus the matter was within the scope of cross-examination. The prosecutor had the right to inquire on the subject. Defendant's third point is denied.

(Resp. Ex. G at 23-24.)

Again, evidentiary rulings are state-law questions and the Supreme Court has ruled that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. at 68. "A state court's evidentiary rulings can form the basis for federal habeas relief under the due process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process." Bounds v. Delo, 151 F.3d at 1119 (quoting Parker v. Bowersox, 94 F.3d at 460.

The admission of the cross-examination testimony regarding Webb's prior conviction did not deprive Webb of due process. Under

federal law, the prosecutor had the right to cross-examine Webb's prior conviction. "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination . . . ." Ohler v. United States, 529 U.S. 753, 759 (2000) (quoting McGautha v. California, 402 U.S. 183, 215 (1971)). In this case, the prosecutor's cross-examination of Webb's prior conviction was reasonably related to the direct examination of Webb's prior conviction. Both concerned the details of his motive for making the false report and the sentencing. Thus, the Missouri Court of Appeals' ruling was not contrary to nor an unreasonable application of federal law.

Ground three is without merit.

GROUNDS 4 and 5

Webb's fourth and fifth claims are that the trial court erred in failing sua sponte to respond to the prosecutor's closing argument that implied personal knowledge that petitioner had shot Calvin McGee and that petitioner would harm the jury, respectively. The two statements complained of are as follows:

> [PROSECUTOR:] . . . You don't even have to find, and it tells you, you don't have -- even have to find that the defendant was the shooter. I submit to you and I know he was the shooter, but you don't even have to find that, so if some of you think that he was the shooter and some of you think, well, maybe somebody else was but we think he aided or encouraged in some other way, that is okay. . . .

(Resp. Ex. B at 1299) (emphasis added.)

> [PROSECUTOR:] This is a man who will go to your home, to your castle, knock on the door and ask for the next guy he's going to murder. . . .

(Id. at 1294-95.)

The Missouri Court of Appeals denied these claims holding:

> Here, the record reveals sufficient evidence of guilt to support defendant's conviction. A reading of the record reflects that the challenged portions of the prosecutor's argument were not based on evidence contained in the record, and were clearly improper. Relief should rarely be granted, however, on assertions of plain error as to closing argument, for where no objection to the argument is lodged, trial strategy is an important consideration and such assertions are generally denied without explication. State v. Newlon, 627 S.W.2d 606, 616[12-14] (Mo. banc 1982). This is true because in the absence of an objection, request for admonishment to disregard, or other specific request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase in the risk of error by such interference. Id. Improper argument will constitute plain error only if it has a decisive effect on the jury. Murphy, 592 [S.W.2d] at 732[9]. Here, based on the record, we cannot say that the challenged arguments had such an effect on the jury. Points denied.

(Resp. Ex. G at 25-26.)

Again, to determine if habeas relief must be granted because of constitutional error at trial, the test is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. at 637. The Supreme Court would review the entire case to determine whether prosecutorial misconduct was so egregious as to amount to a denial of constitutional due process. Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974).

Here the Missouri Court of Appeals reviewed the entire record. It determined that there was sufficient evidence of guilt and, while the prosecutor's statements were improper, they did not have a decisive effect on the jury. The personal knowledge remark that Webb was the shooter was mitigated by the mootness of whether Webb was the shooter or not. And, although improper, the prosecutor's remark about Webb being a person who would go to "your house" seems to refer to his dangerousness and not to any actual harm to the jurors. In light of this and the substantial evidence of guilt in

the record, Webb fails to show this court how the prosecutor's two remarks had such an influence on the jury's verdict as to warrant a reversal of his state court conviction.

Grounds four and five are without merit.

GROUND 6

Webb's sixth claim is that the trial court erred in overruling petitioner's objection to the prosecutor's attempts in closing argument to define "deliberation" and to tell the jury it could convict defendant on nothing more than evidence of aiding or encouraging the acts of others. The challenged arguments are as follows:

> [PROSECUTOR:] . . . Accomplice liability is, if you find and believe from the evidence that John Webb either aided or encouraged another in doing acts – and you'll see those words down here – that he aided or encouraged another person in causing the death, all right. Those are the magic words, so for a person to be guilty and be responsible for the acts of another person, all he has to do is aid or encourage them in doing those acts.

(Resp. Ex. B at 1296-97.)

> [PROSECUTOR:] . . . What that tells you is, as long as you find that whoever the shooter was knew that when they shot at Calvin McGee, they were going to kill him, that is enough for that element. You don't even have to find, and it tells you, you don't have – even have to find that the defendant was the shooter.

(Id. at 1299.)

> [PROSECUTOR:] . . . Again, this is telling you that under accomplice liability, whoever it was that was shooting had to think about it. They had to cooly reflect upon the matter, the length of time, no matter how brief.

(Id. at 1299-1300.)

The Missouri Court of Appeals denied this claim as follows:

> Taken in context, the prosecutor's comments regarding accomplice liability and deliberation were

proper. We evaluate the facts of each case independently, and we will reverse a conviction only if the challenged comments had a decisive effect on the jury's verdict. Murphy, 592 [S.W.2d] at 733. For the challenged comments to have had a "decisive effect," there must be a reasonable probability that, in the absence of these comments, the verdict would have been different. State v. Roberts, 838 S.W.2d 126, 132 (Mo. App. 1992).

To convict a defendant of first degree murder on a theory of accomplice liability, the state must prove that the accomplice deliberated upon the murder; the element of deliberation cannot be imputed. State v. O'Brien, 857 S.W.2d 212, 217-18 (Mo. banc 1993). Deliberation means cool reflection upon the victim's death for some amount of time, no matter how short. Id. A submissible case of accomplice liability for first degree murder exists where there is some evidence that the accomplice made a decision to kill the victim prior to the murder from which the jury could infer that the accomplice coolly deliberated on the victim's death. State v. Gray, 887 S.W.2d 369, 376-77 (Mo. 1994).

Ordinarily, deliberation is proved through evidence of circumstances surrounding the killing. O'Brien, 857 S.W.2d at 218-19. For accomplice liability, circumstances that can support an inference of deliberation must be those properly attributable to the accomplice. Id. Our Supreme Court has outlined three circumstances highly relevant to determining whether accomplice liability may be inferred for first degree murder: first, the defendant or a co-defendant in the defendant's presence made a statement or exhibited conduct indicating an intent to kill prior to the murder; second, the defendant knew that a deadly weapon was to be used in the commission of a crime and that weapon was later used to kill the victim; and third, the defendant participated in the killing or continued with criminal enterprise after it was apparent that a victim was to be killed. Gray, 887 S.W.2d at 376-77.

Here, the comments made by the prosecutor in regard to defendant's accomplice liability and deliberation, were not decisive. At trial, Barbee testified that on the night of the murder, he had heard defendant, Spears and Jones discuss a plan to go to the victim's house and murder Alfredo McGee. Defendant had told Barbee he

> intended to go up to the front door of the victim's home, with a nine millimeter gun, and shoot Alfredo McGee. Defendant showed Barbee a nine millimeter gun with a black handle, and a green bullet-proof vest. In sum, Barbee's testimony provided evidence that defendant, or a co-conspirator in his presence, expressed an intent to kill Alfredo McGee.
>
> Furthermore, Dionne Randle testified that on the night of the murder, defendant and Spears had told Randle about the murder of the victim. They explained how defendant had gone up to the door of Alfredo McGee's house, with Spears and Jones standing beside the house, and upon knocking on the door, had mistakenly shot the victim. They told Randle of the problem concerning Spears' gun, and how after the shooting, they ran to their automobile and drove away. Additionally, Randle testified that on the morning after the murder, she had received a phone call from defendant, in which defendant had told her he was leaving town to avoid being caught for the murder of the victim. Thus, the evidence was overwhelming for conviction. The prosecutor's comments did not make a difference. Point denied.

(Id. at 27-29.)

Again, to determine if habeas relief must be granted because of constitutional error during closing argument, the test is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. at 637. Here, it is clear from the record that the evidence supporting Webb's conviction was overwhelming and that the prosecutor's statements were not outcome determinative. Barbee and Randle's testimony indicated Webb's deliberation and intent to kill. Because the prosecutor's comments could not have had a substantial and injurious effect on the jury's verdict, the Missouri Court of Appeals' decision is not contrary to nor an unreasonable application of federal law.

Ground six is without merit.

GROUND 7

Webb's seventh claim is that the trial court erred in failing sponte to respond to the prosecutor's "ongoing prosecutorial misconduct" based on the prosecutor having engaged throughout the trial in a purposeful pattern of improper questioning of witnesses and improper commentary and argument. The Missouri Court of Appeals did not address Webb's express claim, because it found the disposition of claims four, five, and six dispositive. (Id. at 29.)

Webb argues that the cumulative effect of the multiple instances of prosecutorial misconduct affected the fairness of his trial, considering the entire record. Donnelly v. DeChristoforo, 416 U.S. at 639. After reviewing all of the challenged statements in the context of the entire proceeding, the undersigned concludes that Webb was not denied due process or a fair trial. No instance of argued prosecutorial misconduct had a substantial or injurious effect on the jury's verdict and each was without constitutional merit.

Ground seven is without merit.

GROUND 8

Webb's eighth claim is that the trial court abused its discretion and committed plain error in failing to instruct the jury on the lesser included offense of murder in the second degree. Webb contends that the record does not support a finding that he made a knowing and intelligent waiver of the submission of the lesser included offense to the jury. The Missouri Court of Appeals denied this claim as follows:

> Trial courts are obligated to instruct on a lesser included offense when there is a basis for acquitting the defendant on the greater offense and convicting him on the lesser offense. Section 556.046.2; State v. Mease, 842 S.W.2d 98, 110-112 (Mo. banc 1993). An instruction on the lesser included offense is not necessary if no rational fact-finder could conclude that the defendant acted without deliberation. Id. at 112. Thus, the

> pertinent question is whether the evidence, in fact or by inference, provides a basis for both an acquittal of first degree murder and a conviction of second degree murder. State v. Steward, 936 S.W.2d 592, 594 (Mo. App. 1996). In most homicide cases, the defendant is entitled to a second degree murder instruction if requested. Mease, 842 S.W.2d at 112. This is particularly true where the evidence of deliberation is contradictory and confusing. Id. But here, the evidence adduced at trial clearly shows that defendant planned and prepared to commit murder. We find that no second degree murder instruction was required.
>
> Further, during the instruction conference at trial, defendant directed his counsel to request that a second degree murder instruction not be submitted to the jury. After an extensive examination of defendant by his counsel and the court on the record to show that defendant's request was intelligently made and voluntary, the second degree murder instruction was not submitted.
>
> Pursuant to section 565.025.3, "[n]o instruction on a lesser included offense shall be submitted unless requested by one of the parties or the court." The trial court cannot be held to have erred when, under the circumstances, it followed the express desire of defendant in not submitting a second degree murder instruction to the jury. State v. Williams, 951 S.W.2d 332 (Mo. App. 1997). Point denied.

(Resp. Ex. G at 30-31).

At trial, out of the presence of the jury, the issue of whether to give a second degree murder instruction came up. Defense counsel had anticipated that the prosecutor would request such a lesser-included offense instruction. When that did not happen, in response to the court's inquiry, defense counsel stated in petitioner's presence:

> . . . I had spoken to my client previously about the benefits and the possible detriment to offering that along with a converse. I've spoken to him about it. He's indicated to me that then and now that he's innocent and he does not want that to be an option for the purposes of compromise.

THE COURT: . . . Are you offering a lesser included murder in the Second Degree?

[DEFENSE COUNSEL]: Pursuant to my client's request, no, I am not.

THE COURT: . . . I'm going to ask you, Mr. Webb, have you discussed this -- the fact that your attorney is not offering murder in the Second Degree? Have you discussed this with your attorney?

THE DEFENDANT: Yes.

* * *

Q. [THE COURT:] All right. Now, you understand that the State has charged you with in the murder in the First Degree, but your attorney could at least offer an instruction, a lesser included of murder in the Second Degree which is a different punishment range and she has indicated to the Court, as she's put on the record, that she is not going to offer that as an instruction to the Court, and I'm going to ask you again, have you discussed that? Do you understand what we're talking about here today about this?

A. Yes.

Q. You understand?

A. Yes.

Q. That the only instruction and the only choice that the jurors would have as the way it is right now would be whether you were guilty of murder in the First Degree, they would either find you guilty of murder in the First Degree or acquit you. You understand that?

A. Yes.

Q. All right. And do you wish that your attorney to offer a murder in the Second Degree instruction so that it would be something that they could consider besides murder in the First Degree?

A. No, because I'm innocent.

Q. All right. Now, you understand that the punishment for murder in the First Degree is higher than the punishment for murder in the Second Degree?

A. Yes.

Q. And you have discussed this with your attorney?

A. Yes.

Q. And whose decision is it that murder in the Second Degree instruction not be offered?

A. It's mine because I'm innocent.

Q. All right. So the reason why you don't want murder in the Second Degree -- I'm repeating this because I want to make sure the record is clear about this.

A. Yes.

Q. -- is because you're innocent?

A. Yes.

Q. And all you want the jurors to decide is whether you are guilty of murder in the First Degree or acquit you of the charge?

A. Yes.

Q. And this is completely your decision?

A. Yes.

Q. All right. And before we went on the record, you did have a few minutes to discuss this with your attorney here in the courtroom just before I came out, did you not?

A. Yes.

Q. And did you discuss it with her before that time?

A. No. I just talked to her when she came back in, when she came and talked to me.

Q. But had she discussed this issue with you before coming in here this morning or this afternoon?

A. Yes.

Q. Okay. And again, this is your decision?

A. Yes.

Q. And why do you want it this way?

A. Because I'm innocent.

Q. Okay. All right. All right then, that will conclude the record then on this issue.

(Resp. Ex. B at 1279-83.)

The failure of the state trial court to give a second degree murder instruction did not deprive Webb of due process. There is no constitutional requirement that a lesser included offense instruction be given. See Tatum v. Dormire, 183 F.3d 875, 878 (8th Cir. 1999) (noting that the failure to give a lesser included offense instruction in a noncapital case rarely, if ever, presents a constitutional question). "[D]ue process is not offended when a state trial court refuses in a noncapital case to submit an instruction not supported by the evidence." Id. Here, the trial court did not refuse to submit the lesser offense instruction. Such an instruction was not requested by Webb, but was expressly abjured after consultation with counsel. The record shows that Webb made an informed and competent decision. Further, the Missouri Court of Appeals determined that the evidence in the record did not support a second degree murder instruction. The Missouri Court of Appeals' decision is not contrary to nor an unreasonable application of federal law.

Ground eight is without merit.

GROUND 9

Webb's ninth claim is that there was insufficient evidence to support the conviction of murder in the first degree. The federal habeas standard for determining the sufficiency of evidence is "whether, after viewing the evidence in the light most favorable to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). The Missouri Court of Appeals viewed the evidence presented by the state in grounds one through eight and determined that the evidence was "clearly sufficient so that a reasonable juror might have found that the defendant had deliberated upon and caused the murder of the victim." (Resp. Ex. G at 31.)

It is clear from the evidence that *any* rational trier of fact could have found the essential elements of first degree murder. Barbee testified that John Webb said, "he was going up to the front door and ask for the guy, and when he come [sic] to, the guys immediately shoot him." (Resp. Ex. B at 531.) Further, John Webb had a nine millimeter gun and bullet-proof vest, and he told Barbee he was going to shoot Alfredo with the nine millimeter gun. (Id. at 534.) This is sufficient evidence of petitioner's guilt.

Ground nine is without merit.

GROUND 10

Webb's tenth claim is ineffective assistance of trial counsel based upon counsel's failure to timely investigate and endorse alibi witness Cartellia Webb. The Missouri Court of Appeals denied this claim. The post-conviction motion hearing court found that Cartellia Webb's testimony would have been cumulative to the trial testimony of Shirley Harvey and petitioner, that neither petitioner nor Cartellia Webb was a credible witness at the motion hearing,

and that numerous inconsistencies between his and Cartellia Webb's testimony existed. (Resp. Ex. M at 4-7.)

The Missouri Court of Appeals applied the federal Strickland[2] standard and concluded "[m]ovant was not prejudiced by counsel's failure to present Movant's grandmother's testimony, and the testimony would not have provided Movant with a viable defense. (Resp. Ex. R at 2-4.)

Webb contends that the state court decision is clearly unreasonable in light of the evidence developed during the motion hearing. Webb claims that Cartellia Webb's testimony would have provided him with a viable defense and, had the jury heard her testimony, they would have acquitted him of the charge. (Doc. 17 at 13.)

The Missouri Court of Appeals' application of Strickland was not unreasonable. The court applied the two-prong standard and determined that counsel acted reasonably and that Webb was not prejudiced by the absence of Cartellia Webb's testimony. Further, the court's decision was not unreasonable in light of the evidence presented in the state court proceedings. The motion court found Cartellia Webb incredible. Although she testified that she spoke to Webb at 8:00 p.m. on August 5, 1995, on the telephone when he was at his aunt's house, she could not offer any evidence that Webb remained at his aunt's house throughout the entire evening. (Resp. Ex. N at 24.) Webb's grandmother could not have provided a viable defense and therefore Webb was not prejudiced.

Ground 10 is without merit.

GROUND 11

Webb's eleventh claim is that counsel was ineffective for failing to make an offer of proof as to his grandmother's

[2]Strickland v. Washington, 466 U.S. 668, 687 (1984).

testimony. The Missouri Court of Appeals denied this claim holding,

> Here, trial counsel was not ineffective for failing to make a testimonial offer of proof because (1) trial counsel did not know how Movant's grandmother would have testified, (2) the motion court found Movant's grandmother's testimony would have been cumulative, and (3) the motion court found Movant's grandmother to be an incredible witness. The motion court's findings and conclusions are clearly not erroneous. Point two is denied.

(Resp. Ex. R at 5.) Again, under the Strickland standard, a petitioner claiming ineffective assistance of counsel must show (1) that his attorney's performance was deficient and did not conform to that of a reasonably competent attorney; and (2) that the deficient performance prejudiced the defense. Strickland, 466 U.S. 668, 687 (1984). In this case, defense counsel acted as a reasonably competent attorney. Defense counsel tried to contact the grandmother but was unsuccessful. (Resp. Ex. B at 5.) Defense counsel could not provide an offer of proof when she had not spoken personally to the grandmother. Failing to provide an offer of proof did not prejudice Webb because, as the motion court ruled, the grandmother's testimony would have been cumulative to his and his aunt's testimony that he was at her house at 10:20 p.m. when the grandmother called a second time.

Webb contends that his grandmother's testimony was "admissible corroborating evidence," but evidentiary rulings are state law questions, and it is not the place of a federal habeas court to reexamine state-court determinations on state-law questions. Estelle v. McGuire, 502 U.S. at 68. Because defense counsel acted as a reasonably competent attorney and Webb was not prejudiced by the failure of an offer of proof, the Missouri Court of Appeals' decision is not contrary to, nor an unreasonable application of federal law.

Ground 11 is without merit.

GROUND 12

Webb's final claim is ineffective assistance of trial counsel for failing to object to the prosecutor's improper assertion of personal knowledge and harm to the jury. The Missouri Court of Appeals denied this claim in part, quoting the motion court's holding:

> First, both points [the two improper arguments] were raised in points IV and V of Movant's brief on direct appeal. Issues preserved and litigated on direct appeal cannot be re-litigated in a post-conviction proceeding. . . . Second, "A finding of no manifest injustice under the plain error standard on appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provide [sic] in Strickland v. Washington, *supra*." . . . For these reasons, Movant's final points are dismissed without hearing. (internal citations omitted).

(Resp. Ex. R at 6.) Webb fails to show how he was prejudiced by the failure of his counsel to object to the improper arguments. As stated in grounds four and five, in light of the entire record it is difficult to see how these two comments could have had any influence on the jury's verdict. This is especially true when the jurors were instructed that counsel's arguments are not evidence. (Resp Ex. A at 100.)

Ground 12 is without merit.

RECOMMENDATION

For the above mentioned reasons, it is the recommendation of the undersigned United States Magistrate Judge that the petition of John Webb for a writ of habeas corpus be dismissed with prejudice. Any pending motions should be denied as moot.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The

failure to file timely written objections may result in the waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of September, 2003.